CASE NO. 90-610

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1990

EDWARD WALTHER,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOEL KAPLAN, ESQUIRE
Attorney for Petitioner
28 West Flagler Street
Suite 400
Miami, Florida 33130

QUESTIONS PRESENTED FOR REVIEW

WHETHER THE PROVISIONS OF TITLE 21, U.S.C., SECTION 846, AS THEY EXISTED ON OCTOBER 31,1986, PERMIT THAT ANY SENTENCE IMPOSED THEREUNDER BE WITHOUT PAROLE.

LIST OF INTERESTED PERSONS

The persons having an interest in the outcome of this case are the Petitioner, his family, the United States Attorney for the Middle District of Florida, the United States District Court for the Middle District of Florida and all the judges of the United States Court of Appeals for the Eleventh Circuit.

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

CASES

Britton v. United States,
447 U.S. 381 (1980) 7, 14, 15, 21

Brunelli v. Schmeltzer,
679 F. 2d 824 (11th
Cir. 1982) 12

United States v. Brown,
867 F. 2d 837 (5th Cir. 1989) 447

United States v. Burgess,
858 F. 2d 1512 (11th Cir.
1988) 11, 12

United States v. Montoya,
901 F. 2d 1273 (11th Cir.
1990) 15

United States v. Rollins,
699 F. 2d 830 (11th Cir.
1983) 10

United States v. Slitzer,
889 F. 2d 1004 (11th Cir.
1989) 16

United States v. Robinson,
883 F. 2d 940 (11th Cir.
1989) 16

United States v. Rush,
814 F. 2d 1513 (11th
Cir. 1989) 7, 15, 19, 20

TABLE OF CITATIONS (CONT'T)

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1990

EDWARD WALTHER,

Petitioner,

versus,

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner, Edward Walther, hereby asks that a writ of certiorari issue to review the judgment and the opinion of the United States Court of Appeals for

the Eleventh Circuit entered in Case No. 89-3949 on July 18, 1990.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is contained in an unpublished decision. The decision is reproduced in the Appendix, hereinafter "A.___."

JURISDICTION

Jurisdiction is invoked under Title 28 U.S.C., Section 1254(1). This petition is filed within the authorized time period following the Eleventh Circuit's judgment. See Supreme Court Rule 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> No person shall be...deprived of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

Petitioner, EDWARD WALTHER, was the appellant in the United States Court of Appeals for the Eleventh Circuit and the defendant in the United States District Court for the Middle District of Florida. The respondent, UNITED STATES OF AMERICA, was the appellee in the United States Court of Appeals for the Eleventh Circuit and the plaintiff in the United States District Court for the Middle District of Florida. In this petition, Petitioner will be referred to by name. The respondent will be referred to as the government. The record references in

this petition are to the Record-on-Appeal which was used by the United States Court of Appeals for the Eleventh Circuit and which is now in the possession of the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit. This refernces will be designated by the letter "R" or by the letters "SR" (indicating supplemental record).

On January 15, 1987, a federal grand jury returned Indictment No. 87-11-Cr-T-10C against **WALTHER** and three co-defendants. Count I reads in its entirety as follows:

> On or about October 31, 1986, in the Middle District of Florida, the defendants,
>
> JOHN PAUL WEGER, a/k/a "BUTCH",
> EDWARD ALOIS WALTHER, a/k/a "EDDIE"
> JOHN H. WOODRUFF, and
> MARVIN WALKENSTEIN,

did knowingly and intentionally attempt to possess with the intent to distribute a controlled substance, that is, approximately 2,900 pounds of marihuana, a Schedule I Controlled Substance.

All in violation of Title 21, United States Code, Section 841(a)(1) and 846, and Title 18, United States Code, Section 2.

Count II reads in its entirety as follows:

From an unknown date until on or about October 31, 1986, in the Middle District of Florida, and elsewhere, the defendants,

JOHN PAUL WEGER, a/k/a "BUTCH",
EDWARD ALOIS WALTHER, a/k/a "EDDIE"
JOHN H. WOODRUFF, and
MARVIN WALKENSTEIN,

did willfully, knowingly and unlawfully combine, conspire, confederate and agree, with each other and with diverse other persons unknown to the Grand Jury, to possess with intent to distribute a controlled substance, that is, approximately 2,900 pounds of marihuana, a Schedule I Controlled Substance.

All in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

(See the last unnumbered document in SR). By way of background, **WALTHER** and his three co-defendants thereafter went to trial on these charges, were convicted and sentenced and had their convictions affirmed by the United States Court of Appeals for the Eleventh Circuit in an opinion published under the caption United States vs. Walther, et al, and reported at 867 F.2d 1334 (11th Cir. 1989).

On August 18, 1989, **WALTHER** moved the district court pursuant to Rule 35(a), Federal Rules of Criminal Procedure, as it existed prior to November 1, 1987, to correct his unlawful sentence. SR-206. In his pleading, **WALTHER** demonstrated to the district court that the original sentence it imposed upon him was illegal because it

had been imposed under the belief that Title 21, U.S.C., Section 846, as it existed on October 31, 1986, required the imposition of a minimum mandatory sentence. A subsequent decision from the United States Court of Appeals for the Eleventh Circuit held, relying upon this Court's decision in Bifulco vs. United States, 447 U.S. 381 (1980), to the contrary and led the district court to vacate WALTHER's original sentences and to resentence him. See: United States vs. Rush, 874 F.2d 1513 (11th Cir. 1989). On September 7, 1989, the government responded to this pleading and agreed that the imposition of a minimum mandatory sentence was erroneous. SR-209. On October 6, 1989, the district court entered an Order vacating WALTHER's previous sentences and ordered that

WALTHER be resentenced. SR-210. In addition, on the question of whether WALTHER would be eligible for parole under the new sentences the district court made no finding; rather, it instructed WALTHER to file a supplemental brief on the issue "whether [his] sentence under Section 846 must be served without parole." SR-210-3. This brief was filed on October 19, 1989. SR-215.

WALTHER's new sentencing hearing was held on November 2, 1989. The issue of WALTHER's parole eligibility on a sentence imposed pursuant to Section 846 as it existed on October 31, 1986, was discussed exhaustively. R2-4-18. After the district court decided the issue against WALTHER, R2-17-8, it sentenced WALTHER to serve two six years incarceration, with the sentences to be

served concurrently. R1-218. These sentences were imposed with the expressed stipulation they be served "without parole." R1-18. **WALTHER** is presently incarcerated serving these sentences.

WALTHER appealed this ruling to the United States Court of Appeals for the Eleventh Circuit. On July 18, 1990, that Court issued its decision in which it analyzed the issue as follows:

> The question which remains is whether the provisions of 21 U.S.C., Section 841(b)(1)(A) that "[n]o person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed...", is an "extra" which does not apply to Section 846 convictions as appellant argues or whether, as the government maintains, the non-parolable terms of imprisonment required by Section 841(b)(1)(A) fall within the meaning of the word "imprisonment" as it is used in Section 846. A.4-5

The Eleventh Circuit then held that the

district court had the discretion to impose a sentence without parole eligibilty under Section 846, as it existed on October 31, 1986, but that, unlike Section 841(a)(1), parole ineligibilty under Section 846 was not mandatory. A.5-6. Resentencing of **WALTHER** was ordered only because the sentencing transcript revealed that the district court did not appreciate the mandatory/discretionary distinction found by the Eleventh Circuit. A.5-6. (Although the Eleventh Circuit chose not to publish its decision, it has percedential value in that circuit. Howell vs.Schweiker, 699 F. 2d 524, 526-27 (11th Cir. 1983); United States vs. Rollins, 699 F. 2d 530, 534 (11th Cir. (1983).)

REASON FOR GRANTING THE WRIT.

I.

THE PROVISIONS OF TITLE 21 U.S.C., SECTION 846, DO NOT PERMIT ANY SENTENCE IMPOSED THEREUNDER BE WITHOUT PAROLE.

On November 1, 1987, the Federal Sentencing Guidelines went into effect and as part of the Sentencing Reform Act of 1984 parole was abolished. United States vs. Smith, 840 F. 2d 886, 889 (11th Cir. 1988). The Sentencing Reform Act applies only to those crimes committed after its effective date, November 1, 1987. United States vs. Burgess, 858 F. 2d 1512, 1514 (11th Cir. 1988). As to an offense committed before November 1, 1987, the provisions of the Reform Act of 1984 Sentencing do not apply, even though sentencing occurs after the effective date of the guidelines. United States vs. Serra, 882

F. 2d 471 (11th Cir. 1989). Accordingly, the parole abolition effective November 1, 1987, cannot be applied to any offense committed prior thereto. In the instant case, because **WALTHER**'s crimes were committed prior to November 1, 1987, his sentences are controlled solely by the law as it existed on the date they were committed, October 31, 1986, and not by any subsequent change in the law. United States vs. Burgess, 858 F. 2d at 1514.

Under the law existing prior to November 1, 1987, parole eligibility was governed by the provisions of Title 18, U.S.C., Sections 4205 through 4209, inclusive, unless otherwise prohibited. For example, effective October 26, 1986, Congress explicitly amended Title 21 U.S.C., Sections 841(b)(1)(A) to prohibit parole for someone sentenced thereunder

for having violated the provisions of Title 21, U.S.C., Sections 841(a)(1) and (2). Congress amended Section 841(b)(1)(A) to expressly provide as follows:

> No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed herein. (emphasis added)

Sentence is imposed under Section 841(b)(1)(A) for violations of Sections 841(a)(1) and (2) which provide in total as follows:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

After even a cursory reading of section 841(a)(1), 841(a)(2) and 841(b)(1)(A), it cannot be argued either that they denounce the crimes of conspiracy or attempt or, more importantly, that they provide the punishment for the crimes of conspiracy or attempt. Rather, one who attempts or conspires to commit a substantive offense listed in Section 841(a)(1) or (2) is punished under the provisions of Title 21, U.S.C., Section 846. On October 31, 1986, this statute read in full as follows:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Under its provisions, and until it was amended on November 18, 1988, Section 846

only authorized the imposition of a fine and/or a term of imprisonment, not exceeding the maximum prescribed for the offense which the individual conspired or attempted to commit. United States vs. Montoya, 891 F. 2d 1273, 1293, ftnts. 25 and 26 (11th Cir. 1989). (When Section 846 was amended in 1988, Congress explicitly referred to Bifulco when it expressed its intent to make all the penalties under Section 841(a)(1) apply to Section 846.).

Until this amendment, Section 846 did not authorize the imposition of any of the "extras" found in Section 841(b)(1)(A), such as special parole or minimum mandatory sentencing. United States vs. Rush, 874 F.2d 1513 (11th Cir. 1989) (Exact same wording of Title 21, U.S.C., Section 963, did not require or

authorize the imposition of a "minimum mandatory" sentence like the statute denouncing the substantive offense, Title 21, U.S.C., Sections 952 and 960, did.) See also: United States vs. Robinson, 883 F.2d 940 (11th Cir. 1989). United States vs. Giltner, 889 F.2d 1004 (11th Cir. 1989). Bifulco vs. United States, 447 U.S. 381 (1980) (Conviction under this version of Title 21, U.S.C., Section 846 did not permit the imposition of a special parole term even though the substantive offense statute, Section 841(b)(1)(B), did.) Clearly, the import of these decisions is that the type of punishment and the manner in which it can be imposed under Section 846 is strictly limited to what the statute expressly provided, namely incarceration or fine or both and nothing further. United States

vs. Brown, 887 F. 2d 537, 541 (5th Cir. 1989). ("Under the rule of lenity, since Section 846 does not set a mandatory minimum, and congressional intent is difficult to discern, this Court 'should not interpret criminal statutes so as to pyramid penalties when such an interpretation is based only on guess-work as to what Congress intended.'"). These decisions, quite plainly, require any argument the applicable version of Section 846 proscribed parole must be rejected because the statute did not expressly bar it and without this bar, parole remained available as a matter of law. Finally, a comparison of Section 846 with Section 841(b)(1)(A) compels the same conclusion.

While the version of Section 841(b)(1)(A) which was in effect when

WALTHER committed the offenses for which he was prosecuted, convicted and sentenced provided that "no person sentenced hereunder this subparagraph should be eligible for parole during the terms of imprisonment imposed thereunder," similar language does not appear in the version of Section 846 which governs this case. In fact, when Congress expressly amended Section 841(b)(1)(A), effective October 26, 1986, to make one sentenced under it ineligible for parole, it did not similarly amend Section 846. Because Congress is presumed to be able to express what it intends, its amendment of Section 841(b)(1)(A) to prohibit parole and its failure to do so as to Section 846 must be read as an expression of its intention that parole remain available to someone

sentenced under Section 846 (at least until it was amended on November 18, 1988). United States vs. Rush, 874 F.2d at 1514. See also: Bifulco vs. United States, supra. Congress' failure to do so in light of this Court's decision in Bifulco this can only be viewed as a deliberate choice by Congress to allow parole under Section 846. Accordingly, the government's successful argument to the district court and to the Eleventh Circuit that the parole ineligibility of Section 841(b)(1)(A) can be read into Section 846 must be rejected by this Court because only Congress can legislate the penalties the government would like to see imposed. Bifulco vs. United States, 447 U.S. at 401.

Finally, the Eleventh Circuit's decision must be rejected as illogical.

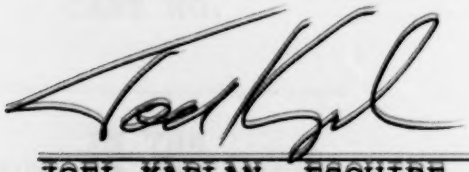
If Sections 841(a)(1) and 846 authorized identical terms of imprisonment as the government argued , then the "no parole" eligibility under Section 846 would be mandatory, not discretionary as the Eleventh Circuit held. Stated otherwise, if Section 846 sentences were controlled by the no-parole term of Section 841(b)(1), then there would be no room for the district court to excuse any discretion. Second, parole eligibility is an extra penalty, like minimum mandatory sentencing, rather than a term governing the length of imprisonment. Therefore, if Section 846 did not authorize a minimum mandatory sentence, United States vs. Rush, supra, it could not have authorized parole ineligibility, especially in light of the absence of express language stating

otherwise. Third, when Congress added the parole ineligibility condition to a sentence under Section 841(a)(1), it knew, or should have known, about this Court's decision in Bifulco. Its failure to add the same language to Section 846 (or to change the language of Section 846 until November of 1988) defeats the Eleventh Circuit's addition of discretionary parole ineligibility under Section 846 which this case makes.

CONCLUSION

For the reasons stated in this petition, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



JOEL KAPLAN, ESQUIRE
Attorney for Petitioner
WALTHER
28 West Flagler Street
Suite 400
Miami, Florida 33130
(305) 373-6634
Fla. Bar No. 219371

CASE NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1990

EDWARD WALTHER,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

UNITED STATES v. EDWARD WALTHER
No. 89-3949 (11th Cir. filed
July 18, 1990) A.1-6

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-3949

D.C. Docket No. 87-00011-Cr-T-10(C)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDWARD ALOIS WALTHER,
a/k/a "Eddie,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

(July 18, 1990)

Before CLARK, Circuit Judge, MORGAN and Hill, Senior Circuit Judges.

MORGAN, Senior Circuit Judge:

MORGAN, Senior Circuit Judge:

Following a jury trial, defendant-appellant, Edward Alois Walther, was convicted of attempted possession of approximately 2,900 pounds of marihuana, in violation of 21 U.S.C. Sections 841(a)(1) and 846 and 18 U.S.C. Section 2 and conspiracy to possess with intent to distribute the same quantity of marihuana, also in violation of 21 U.S.C. Sections 841(a)(1) and 846. The district court sentenced Walther to two concurrent terms of ten years imprisonment, based on its belief that the Anti-Drug Abuse Act of 1986 required the court to impose the minimum mandatory sentence of ten years on each count. Walther's convictions were affirmed on direct appeal. See United States vs. Walther, 867 F. 2d 1334 (11th Cir.), cert. denied, ___ U.S. ___, 110 S. Ct. 144 (1989).

Walther subsequently filed a motion to correct an illegal sentence in the district court, alleging that the court had improperly imposed a minimum mandatory sentence.[1] The government responded to the motion conceding that following the reasoning in United States vs. Rush, 874 F. 2d 1513 (11th Cir. 1989),[2] the district court was not required to impose minimum mandatory sentences on Walther. The government further argued that any sentence reimposed on Walther must necessarily be without parole, citing 21 U.S.C. Section 841(b)(1)(A). Relying on our opinion in

---

[1]Former Fed.R.Crim.P. 35(a) as it existed prior to its amendment effective November 1, 1987, applies in this proceeding.

[2]In Rush, we held that the minimum mandatory sentence provisions of Section 841(b) do not apply to conspiracy convictions imposed under 21 U.S.C., Section 963. See Rush, 874 F. 2d at 1513-15.

Rush, 874 F. 2d at 1513-15, the district court vacated Walther's sentences and held a new sentencing hearing. The district court imposed concurrent sentences of six years imprisonment and concluded that the statute required that the sentences be imposed "without parole." Walther appeals to this court the district court's determination that he is not subject to parole.

Walther was charged and convicted under 21 U.S.C. Section 846 as it existed prior to amendment in 1988 and which provided that "any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." The penalty provisions for the substantive offense,

possession of marihuana with intent to distribute, are found at 21 U.S.C. Section 841(b). It is now settled that the "extras" contained in Section 841(b), special parole and minimum mandatory terms of imprisonment, do not apply to convictions for attempt or conspiracy under 21 U.S.C. Section 846. See e.g., United States v. Robinson, 883 F. 2d 940 (11th Cir. 1989); Bifulco v. United States, 447 U.S. 381,398, 100 S.Ct. 2247, 65 L.Ed. 2d 205 (1980). The question which remains is whether the provisions of 21 U.S.C., Section 841(b)(1)(A) that "[n]o person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed...", is an "extra" which does not apply to Section 846 convictions as appellant argues or whether, as the government maintains, the non-parolable

terms of imprisonment required by Section 841(b)(1)(A) fall within the meaning of the word "imprisonment" as it is used in Section 846.

We hold that because Section 846 authorized the imposition of imprisonment or fines up to the maximum provided for the substantive offense, the district court could properly impose non-parolable terms of imprisonment but was not required to do so. Thus, the district court did not err in imposing two six year terms of imprisonment, without parole, on appellant Walther. We recognize, however, that appellant's sentence might have been affected by the district court's belief, clearly expressed in the sentencing transcript, that it was required to impose non-parolable sentences. Therefore, we VACATE Walther's sentences and REMAND for

resentencing.